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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE,
Petitioner,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, As Receiver of FirstSouth, F.A.,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF AMICUS CURIAE OF GEORGE S. WATSON, A. STARKE TAYLOR, III AND WATSON & TAYLOR REALTY COMPANY IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI

Amicus Watson & Taylor Realty Company ("W&T Realty") is a corporation that manages real estate development projects. Amici George S. Watson and A. Starke Taylor, III are the sole shareholders of W&T Realty and its principal officers. These amici have obtained the written consent of both parties to this case to file a brief in support of petitioner.

Like petitioner Coit Independence Joint Venture ("Coit"), the amici have unadjudicated claims for damages and equitable relief against FirstSouth, F.A. ("FirstSouth"), an insolvent savings and loan association. The decision of the Fifth Circuit in issue in this case vitally impacts amici's interest in the fair and efficient adjudication of its claims by holding, under authority of *North Mississippi Savings and Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986), that all claims asserted against a failed thrift for which FSLIC has been appointed the receiver must be adjudicated exclusively in summary administrative proceedings which bear little resemblance to the judicial process afforded by state and federal courts. Amici have filed this brief in support of petitioner because the ongoing controversy among amici, FirstSouth, and FSLIC as receiver of FirstSouth, starkly illustrates the impropriety of FSLIC's interpretation of its statutory powers.

Over a period of years, amici and FirstSouth engaged in a variety of commercial transactions. In exchange for fees, interest, and a 50% profit participation, FirstSouth agreed to provide funds necessary to acquire and develop many real estate projects managed by W&T Realty. FirstSouth later defaulted on its obligation to fund these projects, the loans became delinquent, and, after FirstSouth was declared insolvent, FSLIC foreclosed on the underlying real estate. Messrs. Taylor and Watson also each purchased approximately 10% of FirstSouth's outstanding shares. When FirstSouth was declared insolvent, each lost an investment of $4.2 million.

These loan and stock transactions have given rise to claims for damages and equitable relief both by amici and by FSLIC as receiver of FirstSouth. FSLIC initiated an action against amici in the Federal Court for the Eastern District of Arkansas, claiming that W&T Realty is obligated by loan guarantees to pay $93 million into the receivership for alleged deficiencies remaining on the loans after foreclosure of the properties. *FSLIC v. Watson, et al.*, E.D. Ark. No. LRC 87-806 (filed November 10, 1987). FSLIC also alleged that Messrs. Taylor and Watson were liable for unpaid amounts on FirstSouth's loans to W&T Realty-managed projects, and additionally contended that they were liable under RICO for treble damages totaling over $200 million.[1] Amici, on the other hand, contend that precisely the same loan and stock transactions also give rise to their claims against FirstSouth for fraudulently inducing the loan guarantees and the stock purchases, which have resulted in millions of dollars in damages compensable under RICO, the Securities Exchange Act of 1934, as well as under state common law causes of action. FSLIC's position, consistent with its practice in prior cases, *see FSLIC v. Provo Excelsior Ltd.*, 664 F. Supp. 1405 (D. Utah 1987); *FSLIC v. Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987), is that amici's counterclaims cannot be asserted in the federal court action brought by FSLIC, but must proceed independently through the FSLIC administrative process under *Hudspeth*,

[1] By order of April 29, 1988, the District Court dismissed FSLIC's complaint for lack of venue, indicating that the action must be maintained in Texas. This decision by no means moots the interest of amici, however, since FSLIC can be expected to ultimately pursue its claims in a District Court where venue is proper.

despite the fact that the claims all arise out of a common nucleus of facts.

SUMMARY OF ARGUMENT

In this case, FSLIC seeks to totally divest all state and federal courts from original jurisdiction over any cause of action asserted by a claimant against a savings and loan institution of which FSLIC is the receiver. The Bank Board and FSLIC have purported to replace the judicial power of state and federal courts with an administrative procedure before a "special representative" appointed by FSLIC which affords almost no right to discovery, no right to compel testimony, no right to cross-examination, and minimal judicial review. Conservators and Receivers; Interim Procedures, 53 Fed. Reg. 13,105 (1988) (to be codified at 12 C.F.R. Parts 547-49, 563, 569a-c) (hereinafter "interim procedures"). FSLIC has maintained that this radical departure from the judicial process is warranted because the questions reserved to administrative process are ones "within the agency's specialization or expertise" and the "administrative claims process is fully capable of granting complete relief". Brief for FSLIC on petition for writ of certiorari at 20, *Zohdi v. FSLIC*, 87-255.

As the circumstances of the controversy with amici and numerous other similarly situated claimants demonstrate, however, FSLIC's interpretation of its statutory powers in fact conflicts with congressional directives and cannot be justified by reference to assertions of efficiency or expertise. First, FSLIC has sought to establish exclusive jurisdiction over all claims against an institution in receivership including many claims, such as claims arising under the anti-

trust and securities laws, which are expressly reserved to the exclusive jurisdiction of the federal district courts. Such claims are totally outside the "agency's specialization" and cannot possibly be adequately adjudicated under FSLIC's truncated procedures. Second, FSLIC's interpretation of its statutory powers would preclude the resolution of an entire controversy in a single unbiased forum. In the many instances in which the receiver seeks to pursue affirmative claims against a creditor, which must be brought in state or federal courts, FSLIC's reservation of jurisdiction over claims against the receivership has and will continue to create piecemeal adjudication of claims with the agency's General Counsel acting as counsel in one of the proceedings and as the decisionmaker in the other. These problems, inherent in FSLIC's procedure, provide additional support for the Ninth Circuit's conclusion in *Morrison-Knudsen Co. v. CHG Int'l., Inc.*, 811 F.2d 1209 (9th Cir. 1987), petition for cert pending *sub nom. FSLIC v. Stevenson Assoc.*, No. 87-451, that Congress never intended to delegate the judicial powers claimed by FSLIC in the case before this Court.

ARGUMENT

I. FSLIC'S INTERPRETATION OF ITS STATUTORY POWERS CONFLICTS WITH OTHER FEDERAL STATUTES VESTING EXCLUSIVE JURISDICTION OVER CLAIMS IN FEDERAL DISTRICT COURTS

FSLIC has interpreted its statutory powers to include the power to divest federal district courts from asserting original jurisdiction over any claim against a failed savings and loan in federal receivership, including claims arising under RICO, the antitrust laws,

and the federal statutes governing securities fraud. *See* Interim Procedures ¶ I.B.9, 53 Fed. Reg. at 13,109 (defining "claims" within the exclusive jurisdiction of the FSLIC administrative proceeding to include the assertion of any "right to payment or other relief against an association or the Receiver"); *Red Fox Industries, Inc. v. FSLIC*, 832 F.2d 340 (5th Cir. 1987) (applying *Hudspeth* to preclude federal court jurisdiction over Sherman Act claim against failed institution for illegal tying arrangement); *Lyons S&L Assoc. v. Westside Bancorporation, Inc.*, 828 F.2d 387 (7th Cir. 1987) (acquiescing in the application of *Hudspeth* to claims under RICO and the Securities Exchange Act). This assertion of regulatory authority lacks *any* direct congressional authorization, and is squarely in conflict with the congressional mandate that all claims arising under RICO, the antitrust laws, and the securities laws be vested in the exclusive jurisdiction of the "district courts of the United States". *See* 15 U.S.C. § 78aa (securities law jurisdiction); 15 U.S.C. § 15 (antitrust jurisdiction); 18 U.S.C. § 1964 (RICO jurisdiction).

The jurisdiction asserted by FSLIC over such claims not only contravenes the express language of these statutes, but is also wholly inadequate to fulfill their remedial purposes. Congress determined that it would not entrust the adjudication of these claims even to the agencies with primary authority for enforcing these statutes. It certainly cannot be inferred that Congress nevertheless intended to permit FSLIC's "special representatives" with no expertise in these areas to resolve the complex legal and factual issues which arise in the course of adjudicating such claims.

Moreover, even if the special representatives' expertise were adequate to resolve such claims, the procedures under which the special representatives must adjudicate those claims are not. This Court has recognized that summary disposition of complex statutory claims without a full opportunity for discovery and factual development cannot fulfill the remedial purposes of such statutes. *See e.g., Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962) ("We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles. . . . It is only when the witnesses are present and subject to cross-examination that their credibility . . . can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'.") *Cf. Sedima, S.P.R.L. v. Imprex Co.*, 469 U.S. 1157 (1985) (rejecting a narrow reading of RICO which permitted summary disposition of most claims in view of the broad remedial purposes of the Act).

The administrative procedures adopted by the Bank Board, however, permit nothing other than summary disposition based upon inadequate discovery. The procedures do not permit any depositions, even of officers and employees of the failed savings and loan institution. They do not provide a right to compel any discovery of any type from a third party, even though such discovery is commonly critical to the assertion of these claims. They do not permit the claimant to compel the testimony of any witness at a hearing on the record. They do not even permit the claimant to cross-examine witnesses who provide statements relied upon by the receiver. Claimants are limited to proof which can be obtained voluntarily or from the

documents of the institution in receivership. FSLIC's claim that it can adequately adjudicate multimillion dollar controversies under the antitrust, securities and RICO laws in this fashion is ludicrous. These wholly inadequate procedures fall so far short of providing even rudimentary due process that Congress could not have intended to permit FSLIC to substitute such proceedings for the judicial processes afforded by federal district courts.

II. FSLIC'S INTERPRETATION OF ITS STATUTORY POWERS WOULD PRECLUDE THE RESOLUTION OF AN ENTIRE CONTROVERSY IN A SINGLE IMPARTIAL FORUM

This Court has repeatedly recognized a strong federal policy in favor of adjudicating an entire controversy in a single forum. *See* Federal Rule of Civil Procedure 13(a) (requiring the assertion of any counterclaim arising out of the "transaction or occurrence that is the subject matter of the opposing party's claim"); *Alexander v. Hillman*, 296 U.S. 222, 241-43 (1935) (finding that jurisdiction of district courts in receivership actions includes the power to determine counterclaims so as to permit "complete relief"); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986) (finding that Congress would not have intended to bifurcate claims between commodities brokers and their customers because such bifurcation would preclude efficient remedies). FSLIC has nevertheless interpreted its statutory powers to permit it to require the bifurcation of controversies.

FSLIC's own claims against alleged debtors to the association must be brought in state or federal courts. The interim procedures, however, require a debtor's claims to be pursued in the administrative forum, and

FSLIC accordingly seeks to dismiss counterclaims asserted in actions that FSLIC itself has brought. *See e.g., FSLIC v. Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987) (dismissing counterclaims under *Hudspeth*.) Thus, in the very common class of cases where the receiver and an alleged debtor have claims against each other, FSLIC's administrative procedure serves to create simultaneous proceedings in two forums, concerning two sides of the same controversy, with the potential for conflicting results. FSLIC has thereby created inefficiencies far greater than those inherent in the judicial process it has sought to displace.

Moreover, the bifurcated remedy afforded is not only inefficient, it is inequitable. Bifurcating proceedings would effectively deprive a debtor of the right to set off certain amounts owed to him against his liability to the savings and loan. Almost a century ago, this Court rejected any interpretation of the banking laws which would impliedly destroy a debtor's equitable right of set-off. *Scott v. Armstrong*, 146 U.S. 499 (1892). *See also, FDIC v. Mademoiselle of California*, 379 F.2d 660 (9th Cir. 1967) (recognizing a right of set-off where FDIC was acting as the receiver of a failed banking institution). And a half century ago, this Court in *Alexander v. Hillman, supra*, specifically recognized that principles of equity required both claims against and counterclaims by a corporation's receiver to be adjudicated in the same action so that a single tribunal could grant "complete relief". FSLIC is accordingly in error when it asserts that "there can be no dispute that the administrative claims process is fully capable of granting complete

relief". FSLIC's petition for certiorari in *Zohdi v. FSLIC*, 87-255 at 20.

Finally, the petitioner's due process claim that the administrative tribunal is impermissibly biased, is blatantly illustrated by the facts of the controversy between amici and FSLIC. The name of FSLIC's General Counsel, Jordan Luke, appears on the complaint as attorney for the receiver of FirstSouth in its claims against amici in federal court. At the same time, Mr. Luke as General Counsel of the Bank Board, is given responsibility to participate in the determination of the merits of amici's claims against FirstSouth in the administrative proceeding.[2] But the claims by and against amici arise out of the same facts, placing the General Counsel in the untenable position of attempting to judge amici's claims impartially in the administrative process, while he simultaneously is contesting amici's version of these same underlying facts in the federal court proceedings.

FSLIC has accordingly created a procedure which effectively permits the lawyer for one of the parties

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[2] *See* Pfeiler, FSLIC Adjudication of Claims Against Receiverships: Has the Search for Efficiency Lost Sight of Due Process?, United States League of Savings Institutions Legal Bulletin 433, 502 (September 1987) (publishing FSLIC administrative procedures which state that the Board has "delegated to the Director, Office of the Federal Savings and Loan Insurance Corporation (OFSLIC), final decisionmaking authority, *with the concurrence of the General Counsel*, for the resolution of administrative appeals. . . .") (emphasis added.) Although the interim procedures do not expressly include the text of this provision, they purport to be the same as prior procedures. Interim Procedures, 53 Fed. Reg. 13,105, 13,111.

to also serve as the judge presiding over the case. These procedures must founder on this Court's admonition that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). The wholly inconsistent roles given to the General Counsel as an individual vividly illustrate the fundamental flaw in FSLIC's effort to perform the conflicting roles of receiver and receivership court. FSLIC, as receiver, is driven by the need to protect FSLIC's severely strained insurance fund, and neither FSLIC, nor the Bank Board as FSLIC's operating head, can be expected to ignore that overriding bias when deciding substantial claims against receivership assets which, if recognized, would increase the insurance fund's outlays. FSLIC's assertion of authority to adjudicate claims is ill-conceived, wholly unauthorized, and should be rejected in its entirety.

CONCLUSION

This Court should reverse the decision below and require FSLIC, like other litigants, to adjudicate controversies in state and federal courts where the procedures afforded can provide full, adequate and impartial resolution of all claims.

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Respectfully submitted,

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